No. SC 84896

IN THE SUPREME COURT OF MISSOURI

CHARLES I. GREWELL *and*
LINDA GREWELL,
Plaintiffs-Appellants

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *and*
NERESSA l. WILKINS
Defendants-Respondents

Appeal from the
Circuit Court of Jackson County, Missouri
The Honorable Jay A. Daugherty

RESPONDENTS' SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

JURISDICTIONAL STATEMENT

Respondents State Farm Mutual Automobile Insurance Company ("State Farm") and Neressa L. Wilkins adopt the appellants' Jurisdictional Statement.

STATEMENT OF FACTS

The appellants' Statement of Facts violates Rule 84.04(i). However, in accordance with Rule 84.04(f), respondents State Farm and Neressa L. Wilkins do not dispute that such facts are fair and concise and, further, are relevant to the questions presented for determination.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY SUSTAINED RESPONDENTS' MOTION TO DISMISS BECAUSE THE APPELLANTS HAVE NO LEGALLY PROTECTABLE INTEREST AT STAKE IN THAT THEY HAVE NO RIGHT OF ACCESS TO RESPONDENTS' CLAIMS FILE.

Corrigan v. Armstrong, Teasdale, Schafly, Davis & Dicus, 824 S.W.2d 92 (Mo. App. E.D. 1992).

May Department Stores Company v. Ryan, 699 S.W.2d 134 (Mo. App. E.D. 1985).

Mitchum v. Hudgens, 533 So.2d 194, 196 (Ala. 1988).

State Farm v. Metcalf, 861 S.W.2d 751,755 (Mo. App. S.D. 1993).

II. EVEN IF THE COURT SHOULD FIND A LEGALLY PROTECTABLE INTEREST, APPELLANTS HAVE AN ADEQUATE REMEDY AT LAW AND, THEREFORE, FOR THIS ADDITIONAL REASON THIS DECLARATORY JUDGMENT ACTION MUST BE DISMISSED.

Northgate Apartments, L.P. v. City of North Kansas City, 45 S.W.3d 475,479 (Mo. App. W.D. 2001).

Graham v. Goodman, 850 S.W.2d 351, 356 (Mo. banc 1993).

III. APPELLANTS' CLAIMS IN COUNTS II AND III FOR ATTORNEY'S FEES

AND FOR NOMINAL AND PUNITIVE DAMAGES MUST ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Windsor Ins. Co. v. Lucas, 24 S.W.3d 151, 156 (Mo. App. E.D. 2000).

Overcast v. Billings, 11 S.W.3d 62, 67 (Mo. banc 2000)

Thornbrugh v. Poulin, 679 S.W.2d 416 (Mo. App. S.D. 1984).

Koenig v. Skaggs, 400 S.W.2d 63 (Mo. 1966)

STANDARD OF REVIEW

In determining whether the appellant's petition for declaratory judgment is sufficient to survive a motion to dismiss, the court not only deems the facts pleaded to be true, but it also construes the averments liberally, drawing all reasonable and inferences from the facts pleaded. See Bailey v. Board of Probation & Parole, 36 S.W.2d 13, 15 (Mo. App. W.D. 2000).

If the allegations in the petition invoke principles of substantive law which, if proved, entitles the pleader to a declaration of rights or status, the pleading is sufficient and must not be dismissed; however, the petition must contain facts to support the pleader's allegations, and not merely conclusions. Id. In addition, if it appears that the plaintiff has no relief against the defendant, the latter should not be forced into litigation that can have no possible final result in favor of plaintiff. King Louie Bowling v. Missouri Insurance Guaranty Association, 735 S.W.2d 35, 38 (Mo. App. W.D. 1987), citing State ex rel. Chilcutt v. Thatch, 221 S.W.2d 172, 176 (Mo. banc 1949).

Further, no justiciable controversy exists and no justiciable question is presented unless an actual controversy exists between persons whose interests are adverse. The plaintiff must have a *legally protectable interest* at stake and the question presented must be appropriate and ready for judicial decision. (Emphasis by the court). State ex rel. Chilcutt v. Thatch, supra, 221 S.W.2d at 176.

Given this legal framework, in order to succeed in resisting respondents' motion to dismiss, appellants must demonstrate that under principles of substantive law they have a

legally protectable interest at stake in this litigation. As the following discussion will show, appellants' petition does not invoke substantive principles of law that would entitle them to the relief sought. Therefore, the trial court's judgment dismissing the appellants' action should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY SUSTAINED RESPONDENTS' MOTION TO DISMISS BECAUSE THE APPELLANTS HAVE NO LEGALLY PROTECTABLE INTEREST AT STAKE IN THAT THEY HAVE NO RIGHT OF ACCESS TO RESPONDENTS' CLAIMS FILE.

A. Introduction

Before addressing appellants' arguments, respondents must point out to the Court that the appellants' declaratory judgment action is based entirely on the faulty premise that an attorney is required to turnover his or her file to the client upon the client's request. Although not determinative of the issues confronting the Court, respondents must voice their objection to this unsupported assumption on the appellants' part.

Respondents note that the Missouri Court of Appeals in Corrigan v. Armstrong, Teasdale, Schafly, Davis & Dicus, 824 S.W.2d 92 (Mo. App. E.D. 1992), specifically found that a client's right to review file materials is a "conditional right" limited to the extent [the client] need(s) to know and understand what has been done for him, no more no less." Id. at 96. The client can enforce this right only to the extent the information is needed. Id.

Although she had been provided with final documents by the defendant that had been prepared and paid for by her late husband, Mrs. Corrigan sought the contents of entire file that was also in defendant's possession. Specifically, Mrs. Corrigan sought "to learn the ideas, opinions and impressions that may be reflected in the attorneys' notes, working

papers, drafts, internal memoranda and the like." Id. The keystone of Mrs. Corrigan's contention was the existence of Mr. Corrigan's "ownership" of the requested documents. Id. at 95. The appellate court disagreed that this "ownership" existed and that at best, during his lifetime, Mr. Corrigan may have acquired a right of access to the information in the documents. Id.

The court of appeals in Corrigan found that since Mrs. Corrigan had not shown why such information would be needed to interpret the final documents prepared by the defendant for her husband, she was not entitled to review the additional documents found in the file. Id. According to the court, "the only ostensibly justified need in that case was Mrs. Corrigan's need to determine whether a malpractice action may exist. Neither ethics nor legal process should be used as a vehicle to satisfy that need." Id. at 99.

Before leaving this point, it is also important for the Court to recognize from the outset the clear distinction between the standard attorney-client relationship and the insured-insurer relationship even when the liability insurer hires counsel to undertake defense of an insured. As discussed in greater detail later in this brief, pursuant to the provisions of the insurance contract, the liability insurer retains the right to investigate, negotiate and settle of any liability claims or suit. Also, the insurer controls the litigation and retains the right to hire as well as dismiss counsel representing the insured. Therefore, the insured does not have the right to retain defense counsel nor does he or she control the litigation. A disgruntled insured is limited to pursuing a bad faith claim or other action such as that brought by the insured in State Farm Mutual Automobile Ins. Co. v. Keet, 644

S.W.2d 654 (Mo. App. S.D. 1982), infra. Therefore, in the absence of a bad faith or other claim, the insured has no right to the claims file

B. The courts have not recognized any "special relationship" between a liability insurer and the insured, which is similar to the attorney-client relationship, that gives the insured the legal right of access to the insurer's claims file.

Appellants' varied contentions in this appeal raise a host of questions: Do liability insurers in Missouri have a fiduciary duty to refrain from engaging in a bad faith *willingness* to settle? Does a liability insurer have a fiduciary duty to protect its insured not only from personal liability in excess of the policy limits but also from possible policy cancellation or premium increases? Further, does a liability insurer have a fiduciary duty to develop its claims file so as to facilitate the insured's efforts or ability to pursue a third party claim? Moreover, is there a duty implied by law owed by a liability insurer to its insured which creates a "special relationship" that elevates the insured-insurer relationship to that of attorney-client giving the insured, among other legal rights, unfettered access the insurer's claims file?

Although appellants' arguments have raised all of these issues for the Court's consideration, the last question serves as the focal point of this appeal.

At the outset, respondents direct the Court's attention to the fact that appellants have failed to reference a single statute, regulation or case that states that a liability insurer,

under *any* circumstances, is duty-bound to share the contents of its claims file with its insured. Additionally, appellants have pointed to no provision within their insurance contract with respondent State Farm that sets forth such a duty. At a loss for authority to support such a proposition, appellants resort to lobbing out various unfounded theories to support their assertion that the entire claims file must be released to them.[1]

Respondents must also point out to the Court that there is no dispute that the Missouri courts have concluded that an "insurer-insured" privilege, which is a variant of the attorney-client privilege, shields certain statements made by the insured to his or her liability insurer from discovery. See State ex rel. J.E. Dunn Construction Co., Inc. v. Sprinkle, 650 S.W.2d 707, 710 (Mo. App. W.D. 1983). However, the mere fact that this "insurer-insured" privilege is recognized by the courts in Missouri does not compel the result that the appellants' seek in this case -- a ruling by the Court that the liability insurer-insured relationship is the same as an attorney-client relationship and, furthermore, that the disclosure rules applicable to an attorney-client relationship gives the insured a right of access to the claims file generated by the liability insurer.

Turning to the appellants' arguments, the Grewells' rely on Craig v. Iowa Kemper

[1] The fact that a particular case or claim advanced by the appellants is not directly addressed is not to be construed as acquiescence on the part of the respondents. To the contrary, it is respondents' position that such cases and claims are flawed and/or irrelevant on their face to the issues presented by this appeal.

Mutual Ins. Co., 565 S.W.2d 716, 722-723 (Mo. App. W.D. 1978) for the broad proposition that "there is generally a reciprocal duty of good faith and fair dealing between an insurer and insureds." Contrary to the appellants' assertions, however, the appellate court in Craig placed well-defined parameters on this implied covenant, to-wit:

> The general jurisprudence recognizes that a policy of insurance imports the utmost good faith by the insurer to perform according to its terms. This principle extends to imply a covenant of good faith and fair dealing from every contract of insurance. *The law thereby assumes the agreement of the insurer not to injure the right of an insured to receive the benefits of the contract*. …
>
> * * *
>
> As applied to a third-party claim for the liability of the insured, *the covenant imposes on an insurer which assumes control over the proceedings against the insured the duty of good faith to settle the claim within the policy limits* and allows recovery in tort to the insured for breach of that duty. (Emphasis added).

Id. at 722-723.

Although decision of the court of appeals in Craig supports the position that the law implies a duty of good faith on the part of the liability insurer to settle claims asserted against the insured within policy limits, the opinion mentions nothing from which one could extrapolate a duty on the part of a liability insurer to share its claims file with the insured.

Attempting to build upon this notion of an implied duty owed by a liability insurer, appellants next contend that State ex rel. Cain v. Barker, 540 S.W.2d 50 (Mo. banc 1976) establishes that the implied duty of good faith to settle within policy limits is in essence the same as the fiduciary duty owed by an attorney to his or her client. According to the appellants, this Court in Cain "recognized a special relationship between the liability insurer and the insured, which is similar to the relationship of an attorney and client." Appellants' Substitute Brief, p. 24. As discussed below, the appellants have misread the holding in this case.

In a case of first impression, this court in Cain held that an insured's statement to his liability insurance company concerning an event that may be the basis of a covered claim against the insured is clothed with a privilege protecting it from discovery by third persons who file suit against the insured. State ex rel. Cain v. Barker, supra, 540 S.W.2d at 53-54. What is significant in the context of the present case, however, is the fact that the ruling in Cain was not grounded on the existence of this so-called "special relationship" between the insured and his liability carrier that is comparable to the relationship between attorney and client. In fact, the existence of a “special relationship” is never mentioned. Rather, this Court, quoting from “Privilege of Communications or Reports Between Liability or Indemnity Insurer and Insured," 22 A.L.R.2d 659 (1952), arrived at its ruling by acknowledging that:

> “According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which

> may be the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him."

State ex rel. Cain v. Barker, supra, 540 S.W.2d at 54.

Moreover, the appellate court in a subsequent decision, May Department Stores Company v. Ryan, 699 S.W.2d 134 (Mo. App. E.D. 1985), specifically stated that "[a]n existing insured-insurer relationship, whereby an insured is contractually obligated to report promptly covered incidents to the insurer who in turn is obligated to defend and indemnify the insured, *is similar to an attorney-client relationship* ***insofar as discovery is concerned****."* (Emphasis added). Id. at 136. Citing to Cain, the court in May Department Stores stated as follows: "Any communication between insured and insurer which relates to the former's duty to report incidents and the latter's duty to defend and indemnify falls within the attorney-client privilege and is excluded from discovery under Rule 56.01(b)(1)." Id.

Therefore, there is absolutely no precedent for expanding the "attorney-client" relationship comparison made in Cain beyond the limited situation of an insured's communication to his or her liability insurer concerning an event that may be the basis of a third party claim.

Not to be deterred by the lack of authority for their attorney-client analogy,

appellants also rely on State ex rel. J.E. Dunn Construction Co., Inc. v. Sprinkle, 650 S.W.2d 707 (Mo. App. W.D. 1983) and Brantley v. Sears Roebuck & Co., 959 S.W.2d 927 (Mo. App. E.D. 1998) as support for their assertion that a liability insurer has a fiduciary duty to share its claims file with the insured because the two parties have "an identity of interest." Again, appellants' seek to convince the Court that there is authority for its argument that there is a judicially recognized "special relationship" between a liability insurer and its insured that renders such relationship for all purposes that of attorney-client.

The courts in both Sprinkle and Brantley were faced with the question whether the insured-insurer privilege should be extended to shield information gathered in connection with a casualty loss from discovery by a third party. In the course of distinguishing between liability and property insurance coverages, both courts merely commented that the former relationship is characterized as one of identity of interest while the latter is adversarial until the insurer acknowledges coverage. State ex rel. J.E. Dunn Construction Co., Inc. v. Sprinkle, supra, 650 S.W.2d at 710; Brantley v. Sears Roebuck & Co., supra, 959 S.W.2d at 928. Thus, Sprinkle and Brantley fall short of either explicitly or implicitly holding that certain rights and obligations arise from this "identity of interest" that require a liability insurer to share its claims file with the insured.

Respondents also direct the Court's attention to the fact that appellants' reliance on State Farm Mutual Automobile Ins. Co. v. Keet, 644 S.W.2d 654 (Mo. App. S.D. 1982) is likewise misplaced.

Keet arose from a lawsuit in which one State Farm insured sued another State Farm

insured for personal injuries resulting from an accident involving the two insureds. One of the insureds brought a subsequent lawsuit against State Farm in which such insured sought production of all letters and memoranda exchanged between State Farm and the attorney that State Farm had hired to defend the insured in the underlying personal injury lawsuit.

In vacating its preliminary writ of prohibition, the court in Keet held that where an insurer employs counsel as specified in its policy to represent its insured, and both the insurer and insured consult with such counsel for their individual and mutual benefit, *testimony or evidence as to communications between that insurer and insured, or between either of them and their mutual attorney,* are not privileged in a later transaction between such parties or their representatives. (Emphasis added). Id. at 655.

However, it must be noted that the court in Keet was careful to point out that its ruling requiring disclosure was based on the fact that the insured requesting the information was a distinct component part of the "tripartition" existing of himself, State Farm and the lawyer hired by State Farm to represent him. Id. It is significant that the court also held that the insured had no right to access any correspondence or memoranda found in State Farm's file that pertained to the other insured. Id. Thus, the court would have refused a request for the entire claims file.

As in the other cases cited by the appellants, the court in Keet did *not* mention much less recognize the elusive "special relationship" that appellants' allege exists between a liability insurer and the insured that gives such insured access to all information contained in the liability insurer's claims file.

Respondents do not take the position that there is no circumstance under which a liability insurer owes its insured a fiduciary duty. Certainly, as discussed in detail above, a liability insurer clearly owes a fiduciary duty to its insured to settle claims made against the insured within policy limits so as to protect the insured from personal exposure in excess of the policy limits. See, e.g., Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554 (Mo.App.S.D. 1990) and cases cited therein. This duty, however, only implicates the principle known as "bad faith refusal to settle." Id.

The present case does not involve the principle of bad faith refusal to settle. The appellants are not complaining that respondent State Farm is being too harsh in its evaluation of Mr. Kephart's claim such that it is refusing to settle such claim in bad faith thereby potentially exposing Mrs. Grewell to personal liability in excess of her policy limits. Rather, Mrs. Grewell is accusing respondent State Farm of doing just the opposite; that is, she is accusing the respondent of being *too lenient* in its evaluation of the Kephart claim.

Indeed, there appears to be no such principle as bad faith willingness to settle. At least two courts have effectively rejected such a concept. See Charter Oak Fire Ins. v. Color Converting Co., 45 F.3d 1170 (7th Cir. 1995) (under Iowa law, product liability insurer did not have an implied duty to avoid handling the insured's claim in such a manner that would cause the insured to lose its best customer) and Reid v. State Farm Mut. Auto. Ins. Co., 173 Cal.App.3d 557, 218 Cal.Rptr. 913 (2d Dist.1985) (liability insurer who allowed the vehicle driven by the permissive user to be destroyed did not have duty to

preserve the vehicle so as to protect permissive user's products liability claim against third parties).

Based primarily on their misapplications of the holdings in the cases discussed above, the appellants ask the Court to rule that simply because an insured's statement to his or her liability insurer is protected by the same privilege that adheres between an attorney and his or her client, the liability insurer must likewise owe its insured fiduciary duties identical to those that an attorney owes his client. Therefore, appellants argue that the insurer owes its insured free access to its claims file. Respondents reiterate that there is no support either under the contract or implied by law for such a ruling by the Court.

Any duty that a liability insurer would have to allow its insured free access to its claims file must arise from the broader fiduciary duty to protect the insured against exposure to personal liability in excess of the insured's policy limits. In other words, the duty to produce the claims file would arise only in the context of a claim by the insured for bad faith *refusal* to settle. Since the appellants in this case are not making such a claim, there is no fiduciary duty implicated here under which respondent State Farm could be compelled to produce its claims file.[2]

C. Furthermore, the respondents' refusal to release the claims file to the

[2] As respondents pointed out to the trial court, whether or not the claims file technically qualifies as "work product" is immaterial to the question of whether respondents can be compelled, through the type of lawsuit filed here, to produce their claims file.

appellants does not violate public policy.

The appellants dispute the fifty percent (50%) liability determination and express a concern that such fault determination could impact their insurance premiums or ability to maintain insurance coverage.

According to the appellants, their practical legal rights are affected by their inability to effectively dispute the fault determination by the company. Stated differently, they contend that an insured must be allowed access to the claims file in order to have the opportunity to dispute the company's determination regarding such insured's liability for an accident.

As the following discussion will demonstrate, the respondents' actions did not violate public policy. [3]

[3] The appellants further contend that insurance companies have access to a service that maintains and reports the insurance claims history of individuals. As was determined by the court of appeals, the argument based on an insured's need to address the public reporting of claims determinations cannot be considered because it was raised for the first time on appeal.

There is no dispute that the contract of insurance issued to the appellants provided that "[a]s part of the liability coverage, State Farm agreed to defend the Appellants against any claim or suit involving Appellants' liability, further reserving the right to investigate, negotiate and settle any claim or suit." (L.F. 6 and Appellants' Substitute Brief, pp. 12, 23).

The fiduciary duty of an insurer for good faith rests on the reservation of the exclusive right to contest or negotiate the claim of liability brought against the insured. Duncan v. Andrew County Mut. Ins. Co., 665 S.W.2d 13, 19 (Mo. App. W.D. 1983), quoting Craig Iowa Kemper Mut. Ins. Co., 565 S.W.2d 716 (Mo. App. W.D. 1978).

The majority of other courts construing identical or similar provisions have likewise concluded that pursuant to this provision, the liability insurer has the exclusive right to make a settlement of any claim brought against its insured within policy limits. See Mitchum v. Hudgens, 533 So.2d 194, 196 (Ala. 1988).

In Mitchum, the insured doctor alleged that he suffered damage to his professional reputation, was unable to obtain medical malpractice coverage and experienced a loss of business as the result of the insurer settling a malpractice claim that had been filed against him. Quoting from 7C J. Appleman, *Insurance Law and Practice,* § 4711 (3d. ed. 1983), the court in Mitchum noted:

> "It was early stated that an insurer has the right to make a compromise and settlement of any claim brought against its insured, and that it is not bound to consult the interests of the insured to its own prejudice. The law favors settlement without recourse to litigation. Liability insurance contracts have

been held to give the insurer the absolute authority to settle claims within policy limits, and the insured has no power either to compel the insurer to make such settlements, *or to prevent it from doing so*."

(Emphasis by the court). Id.

According to the court in Mitchum, the insured contracted away any right to consent to a settlement by agreeing that the insurer could settle claims as it thought appropriate. Id. at 197-198.

Thus, the only question that remains is whether the respondents would violate public policy by settling the third party claim against Mrs. Grewell and then refusing to produce the claims file.[4]

"Public policy " is that principle of law that holds that no one can lawfully do that which tends to be injurious to the public or against the public good. Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. App. W.D. 1985). It finds its sources in the letter and purpose of a constitutional, statutory or regulatory provision or scheme. Id.

With regard to contractual limitations or conditions placed on liability insurance coverage, this Court ruled many years ago that public policy requires that a contract of liability insurance provide the coverage indicated in Section 303.190, RSMo of the Motor Vehicle Financial Responsibility Law (MVFRL). See Halpin v. American Family Mutual

[4] At the time of the writing of this brief, the undersigned have no knowledge whether the claim against Mrs. Grewell by Mr. Kephart has in fact been settled.

Insurance Co., 823 S.W.2d 479, 483 (Mo. banc 1992). The effect of Halpin and its progeny is to guarantee that injured parties are protected, as a matter of public policy, for damages for personal injuries up to $25,000 per person and $50,000 per accident. State Farm v. Metcalf, 861 S.W.2d 751,755 (Mo. App. S.D. 1993). A provision in liability coverage that, if enforced, would otherwise defeat that purpose is void. Id.

By the same token, the court in Metcalf made note that a contractual provision that places conditions or limitations on additional coverages such as the duty to provide the insured with a defense, does not thwart the statutory protection afforded by the MVFRL and, thus, does not violate public policy. According to the court, the contractual obligation to defend claims for personal injury or property damage is protection provided the insured, not the person injured. Id.

Returning once again to the policy provisions, the appellants agreed that respondent State Farm has the exclusive right to make a settlement of any claim brought against its insured within policy limits. According to the well-established law in Missouri, neither respondents' assessment of fault, a settlement of the third party claim nor the refusal to release claims file will violate public policy.

The appellants are simply unable to show that under principles of substantive law they have a legally protectable interest that is at stake. Therefore, this action must be dismissed.

II. EVEN IF THE COURT SHOULD FIND A LEGALLY PROTECTABLE

INTEREST, APPELLANTS HAVE AN ADEQUATE REMEDY AT LAW AND, THEREFORE, FOR THIS ADDITIONAL REASON THIS DECLARATORY JUDGMENT ACTION MUST BE DISMISSED.

As noted by the court of appeals, a declaratory judgment action is not a catchall for every kind of dispute. It is available only under the proper circumstances.

In order to maintain a declaratory judgment action, the petition must satisfy four requirements: (1) it must demonstrate a justiciable controversy which presents a real, substantial presently-existing dispute as to which specific relief is sought; (2) it must demonstrate a legally protected interest consisting of a pecuniary or personal stake directly at issue and subject to immediate or prospective relief; (3) the question presented by the petition must be ripe for judicial determination; and, finally (4) a petitioner that satisfies all three elements must then demonstrate that he or she does not have an adequate remedy at law. Northgate Apartments, L.P. v. City of North Kansas City, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001); Graham v. Goodman, 850 S.W.2d 351, 356 (Mo. banc 1993).

The court of appeals correctly ruled that the appellants' have failed to satisfy all four requirements. According to the appellate court, when and if the appellants are involved in the prosecution or defense of a formal claim, they will have the right to conduct formal discovery of the claims file pursuant to a subpoena as to the items that may be admissible or which may lead to the discovery of admissible evidence.

Therefore, should the Court find that the appellants have shown a legally protectable interest that can survive dismissal for failure to state a claim upon which relief can be

granted, this action still must be dismissed.

III. APPELLANTS' CLAIMS IN COUNTS II AND III FOR ATTORNEY'S FEES AND FOR NOMINAL AND PUNITIVE DAMAGES MUST ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A prerequisite for any relief sought by the appellants in Counts II and III, which assert claims for attorneys' fees and for nominal and punitive damages, was a ruling in favor of the appellants on Count I. Thus, the trial court's dismissal of those remaining two counts proper. But notwithstanding the absence of liability on Count I, Counts II and III fail to state causes of action standing by themselves.

The American Rule applies to declaratory judgment actions. Windsor Ins. Co. v. Lucas, 24 S.W.3d 151, 156 (Mo. App. E.D. 2000). Under the American Rule, absent statutory authorization or contractual agreement, with few exceptions, each litigant must bear their own attorney's fee. Harold S. Schwartz v. Continental Cas., 705 S.W.2d 494,498 (Mo. App. E.D. 1985).

Special circumstances are an exception to the American Rule; however, this exception is narrow and must be strictly construed. Windsor Ins. Co. v. Lucas, supra, 24 S.W.3d at 156. Among the limited scenarios where "special" or "very unusual" circumstances have been shown include intentional misconduct by a party; an action brought by an estate beneficiary who successfully brought litigation to the estate as a whole; and an action where the litigant has successfully created, increased or preserved a fund in which

non-litigants were entitled to share. Id.

The present scenario as a matter of law does not qualify as a “special” or “very unusual” circumstances as to warrant obviation of the stringent American Rule requiring the parties to bear their own attorney’s fees as alleged in Count II.

Moreover, it is well-recognized law in Missouri that if an insurance company breaches a contractual obligation, which is apparently the claim of the appellants in Count I, and if a the fact finder believes that such breach was "vexatious," then pursuant to Section 375.420, RSMo, a plaintiff can seek damages for attorney's fees, interest and penalties, all as prescribed by the statutes. However, as a matter of law, the appellants are not allowed to make a claim for "punitive damages" based merely upon a breach of a contract provision.

As recently discussed by the Court in Overcast v. Billings, 11 S.W.3d 62, 67 (Mo. banc 2000), punitive damages are only allowed based upon an alleged independent tortious act by the insurance company. It should be noted that in Overcast, the alleged tortious act on the part of the insurance company was a claim of defamation, based upon statements made resulting from the fire claim investigation. Clearly, in the instant matter, the appellants are not alleging any such legally recognized "tort," as in Overcast.

Further, the longstanding law in Missouri is that before one is entitled to punitive damages, they must have actual damages. Adelstein v. Jefferson Bank & Trust Company, 377 S.W.2d 247 (Mo. 1964); Thornbrugh v. Poulin, 679 S.W.2d 416 (Mo. App. S.D. 1984); Koenig v. Skaggs, 400 S.W.2d 63 (Mo. 1966). The appellants have not alleged any actual damages, simply because they obviously have none. In fact, Count III of the

appellants' petition specifically makes a claim for "nominal" damages, and punitive damages. For this reason alone, the trial court's dismissal of Count III was proper.

CONCLUSION

For the foregoing reasons, respondents State Farm Mutual Automobile Insurance Company and Neressa Wilkins respectfully request that the trial court's judgment in favor of the respondents dismissing this action be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Respondents' Substitute Brief and a floppy disc containing a copy of the foregoing were mailed U.S. Mail, postage prepaid, this 20th day of January, 2003, to:

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This certification includes below the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, and fax number.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. This brief contains 5932 words, according to the word-processing system used to prepare the brief.

4. Microsoft Word 97was used to prepare this Brief of Respondent.

5. The diskette provided with this brief has been scanned for viruses and is virus free.

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